

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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In re: Methyl Tertiary Butyl Ether (“MTBE”)  
Products Liability Litigation

**Master File No. 1:00-1898  
MDL 1358 (SAS)**

This Document Relates To:

The Honorable Shira A. Scheindlin

*Orange County Water District v. Unocal Corporation  
et al.*, Case No. 04 Civ. 4968 (SAS)

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**ERRATA TO PLAINTIFF ORANGE COUNTY WATER DISTRICT’S OBJECTIONS  
TO NEW EVIDENCE SUBMITTED WITH DEFENDANTS’ REPLY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff inadvertently omitted exhibits A and B, cited in note 3 of Plaintiff Orange County Water District's Objections to New Evidence Submitted with Defendants' Reply in Support of Motion for Summary Judgment. Plaintiff submits this errata and Exhibits A and B, attached hereto.

DATED: August 28, 2014

Respectfully submitted

/s/  
\_\_\_\_\_  
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# **EXHIBIT A**

Law Offices of  
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August 20, 2014

**VIA EMAIL**

Whitney Jones Roy, Esq.  
Sheppard, Mullin, Richter & Hampton LLP  
333 South Hope Street, 48th Floor  
Los Angeles, California 90071-1448

Re: *Orange County Water District v. Unocal Corporation, et al.*  
**Meet and Confer**

Dear Ms. Roy:

Please consider this our meet and confer letter in response to your e-mail dated August 13, 2014. You asked which of the new evidence that defendants attached to their reply briefs that the District intends to address. The District intends to object to all of the new arguments raised in the reply, the new declarations reflecting counsel opinion, and the new evidence filed in support of both the new and prior arguments. Defendants are aware that sur-reply briefs are not permitted by the court or under any federal or local rule, yet defendants raised new arguments and filed new exhibits at the reply stage which has sand-bagged the District. Defendants' filings are both improper under the rules and prejudicial to the District.

A. Improper Declarations

1. Declaration of Stephanie Chen (entire declaration) (cited at 56.1 ¶¶ 119, 120, 121, 125, 139, 141, 156, 176, 187 and Reply at 18 and defendants' objections to the District's evidence at objection #28).

The Declaration of Stephanie Chen is particularly egregious as Ms. Chen already filed a 5-page, 16- paragraph declaration propounding her own personal beliefs as counsel and providing zero supporting exhibits. Chen Decl. (I). Here, Ms. Chen has yet again propounded more personal opinions as counsel in a 3-page, 8-paragraph declaration. Chen Decl. (II). It is improper, prejudicial to the District and should be withdrawn. Opinions of counsel are not

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proper evidence at any stage of the litigation and could properly be a basis for deposition of Ms. Chen.

2. Declaration of Micahel E. Hager (entire declaration) (cited at 56.1 ¶¶ 56, 57, 58, 62, 63).

The Declaration of Michael E. Hager filed by Lyondell is also improper. Lyondell previously filed the Declaration of Alex Blagojevic in support of the opening briefs. The information alleged in the declaration of Michael Hager could have been, but was not provided in the opening briefs and is improper and prejudicial to the District and should be withdrawn.

3. Declaration of John DiChello II ¶¶ 2, 7 (cited at 56.1 ¶¶ 120, 142, 243, 244, 245, 269, 270 and defendants' objections to the District's evidence at Objection #28) and the Declaration of Diana Pfeffer-Martin II ¶ 7 (56.1 ¶¶ 48, 142, 242, 243, 244, 245, 272 and defendants' objections to the District's evidence at Objection #28).

Counsel for Tesoro and Lyondell filed declarations reciting their own personal opinions which is improper and should be withdrawn. Declaration of Diana Pfeffer-Martin (II) at ¶ 7 and Declaration of John DiChello (II) at ¶¶ 2, 7.

B. Improper Arguments and Exhibits

1. Reply Brief at 11-12 and Roy Decl. (II), Exs. 93, 94, and 95.

First, defendants make a new argument at pages 11-12 that could have been made in their opening brief but was not. It is prejudicial to the District to make such a new argument in the Reply. Second, Roy Exs. 93-95 are newly cited and not mentioned in defendants opening brief but cited for the first time in the Reply. Third, Roy Exs. 93-95 were not cited in the 56.1 Statement and should be withdrawn.

2. The following exhibits were cited for the first time in the Reply materials:

- a. DiChello Decl. (II), Ex. 82 (cited at 56.1 ¶¶ 117, 121, and 299), Ex. 84 (cited at 56.1 ¶300);
- b. Martin Decl. (II), Ex. 90 (cited at 56.1 ¶ 159);
- c. Anderson Decl. (II), Ex. 92; (cited at 56.1 ¶ 6, 7, 8); and
- d. Roy Decl. (II), Ex. 96, in part (exhibit attached to depo. and cited at 56.1 ¶2).

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Although a few of the newly filed exhibits may have been filed for the purpose of completion, these exhibits were not previously cited by any party and it is prejudicial to cite new evidence for the first time at the reply stage.

In the spirit of compromise, we are willing to forego filing a motion to strike all exhibits if you will withdraw the declaration of Stephanie Chen, the declaration of Michael Hager, resubmit the declarations of Diana Pfeffer Martin (II) and John DeChello (II) without the opinion language and strike the citations thereto in the Rule 56.1 Statement and defendants' opposition to the District's evidence, withdraw the new argument in your reply brief at pp. 11-12, withdraw the new exhibits and the corresponding statements of fact as noted above. Please let us know your answer promptly as we will be filing our motion to strike on Monday, August 25<sup>th</sup>.

Very truly yours,

  
Molly McGinley Har

# **EXHIBIT B**



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August 21, 2014

**Via E-Mail and File & Serve**

Molly McGinley Han, Esq.  
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Re: *Orange County Water District v. Unocal Corp., et al.*  
No. 04-CV-4968, Master File No. 1:00-1898, MDL 1358 (SAS)

Dear Ms. Han:

This letter responds to your August 20, 2014 meet and confer letter, sent in connection with Defendants' Motion for Summary Judgment. You allege that Defendants included improper declarations, arguments, and exhibits in support of their Reply. Defendants dispute OCWD's allegations. OCWD presented several arguments and evidence for the first time in its Opposition to Defendants' Motion for Summary Judgment, as well as misstated or mischaracterized Defendants' evidence. Defendants' Reply was the first opportunity for Defendants to rebut and respond to Plaintiff's mischaracterizations, new arguments, and evidence. Accordingly, Defendants' additional materials were properly submitted. *Bayway Refining Co. v. Oxygenated Marketing and Trading*, 215 F.3d 219, 226-27 (2d Cir. 2000) ("[R]eple papers may properly address new material issues raised in the opposition papers so as to avoid giving unfair advantage to the answering party."). In fact, Judge Scheindlin anticipated Defendants' need to rebut and respond to OCWD's arguments. *Tr. of Conference In Re: MTBE Products Liability Litigation* (April 16, 2014), at 33:5-6 ("Basically, your work is going to be on the reply brief, as far as I can tell on that.").

Below we respond to each of the items noted in your August letter.

A. Declarations

1. Reply Declaration of Stephanie Chen

The Chen Reply Declaration was properly submitted. It was not until OCWD filed its Opposition that Defendants learned OCWD was alleging causation against Tesoro and Valero based on a newly revised commingled product theory of liability. Prior to filing its





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Opposition, Tesoro and Valero understood OCWD's commingled product theory was based on sales to jobbers that delivered or could have delivered to stations (the "jobber-based commingled product theory"). OCWD morphed the commingled product theory of liability in its Opposition, instead alleging that limited sales of product to CMO No. 116 stipulating refiners anywhere in California was sufficient to demonstrate delivery of Tesoro and Valero product to CMO No. 116 stipulating refiner Focus Stations (the "refiner-based commingled product theory").

The Chen Declaration submitted with Defendants' Motion pertained to OCWD's jobber discovery efforts in the context of a jobber-based commingled product theory. The Chen Reply Declaration responds to OCWD's new refiner-based commingled product theory of liability and outlines OCWD's discovery efforts regarding sales between various Defendants. Tesoro and Valero would be unduly prejudiced if OCWD were permitted to rely on the newly created refiner-based commingled product theory, articulated for the first time in its Opposition, without being given the opportunity to respond.<sup>1</sup>

Contrary to your characterization, the Chen Reply Declaration does not contain "personal beliefs." Rather, it outlines OCWD's discovery efforts with respect to sales between Defendants. In an effort to avoid burdening the Court, the Chen Reply Declaration referenced discovery readily available on File & Serve rather than attach it (and is the reason there are "zero supporting exhibits").

## 2. Declaration of Michael E. Hager

The Declaration of Michael E. Hager was submitted by BP, not Lyondell. The information contained in this declaration was previously provided in the Declaration of William Costley, submitted in support of Defendants' Motion with the opening briefs. OCWD elected not to respond to the content of the Costley Declaration, but rather simply objected to the form of the declaration. The Hager Declaration does not contain new evidence nor is it prejudicial to OCWD<sup>2</sup>; it is a response to OCWD's evidentiary objection to the Costley Declaration, which BP does not concede is valid, and provides no facts not provided in the Costley Declaration (which OCWD did not substantively dispute).

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<sup>1</sup> Defendants agree to strike references to the Chen Reply Declaration in Defendants' Reply 56.1 ¶¶ 119-121, 125 and 139.

<sup>2</sup> Indeed, the facts contained in the Hager Declaration have never been in dispute, including when BP provided this information to OCWD in 2010 in conjunction with CMO #75.



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3. Reply Declarations of John DiChello at ¶¶ 2, 7 and Diana Pfeffer Martin at ¶ 7

Neither Lyondell nor Tesoro knew OCWD intended to attempt to prove causation alleging direct product tracing or market share liability given its prior representations that it would seek to establish liability based solely on the commingled product theory. OCWD raised these theories for the first time in its Opposition. The referenced paragraphs in the DiChello and Martin Reply Declarations simply explain that OCWD's Opposition sets forth new alleged theories of liability. In addition, recitations of the events of the April 8, 2014 meet and confer in the DiChello and Martin Reply Declarations are not "personal opinions," they are facts that OCWD has not refuted and cannot refute.

B. Arguments and Exhibits

1. Reply Brief at 11-12 and Roy Decl. (II), Ex. 93-95

Defendants' legal argument in the Reply regarding the OCWD Act's legislative history was in response to OCWD's unanticipated argument regarding the meaning of the OCWD Act. Defendants' motion was premised on the plain language of the OCWD Act and clear case law interpreting that Act. In Opposition, OCWD cited the legislative history of *other* statutes, and argued that this history supports its view of the legislative intent behind the OCWD Act. OCWD's characterization of the legislative history it cited was misleading, in part because of the legislative history of the OCWD Act itself, which OCWD failed to disclose to the Court. To correct the misimpression OCWD's Opposition left and respond to OCWD's new arguments going well beyond the OCWD Act and case law interpreting it, Defendants provided the arguments and related authority in their Reply and Roy Reply Declaration. This legal argument was proper, and was submitted as legal argument, not as a disputed fact.

2. Exhibits

a. DiChello Decl. (II), Ex. 82, Ex. 84

Lyondell was forced to submit a second declaration with exhibits because OCWD misstated the evidence and made arguments for the first time in its Opposition. (Reply DiChello Dec. ¶ 2.) In particular, in response to undisputed facts set forth in Defendants' Rule 56.1 Statement, OCWD offered new evidence authored and prepared by American Petroleum Institute ("API") against Lyondell. (56.1 ¶¶ Opp. 117, 121, 299 (citing Miller Dec., ¶ 2, Ex. 1, and Axline Dec., ¶ 4 Ex. 3).) Lyondell, however, has never been a member of API. Therefore, this evidence is irrelevant to Lyondell and inadmissible against Lyondell. Lyondell had no choice but to refute OCWD's misstatement by offering Exhibit 82.



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Likewise, OCWD mischaracterized the evidence in paragraph 300 of its Separate Rule 56.1 Statement in reciting the statement by Lyondell's predecessor-in-interest ARCO Chemical Company, a Delaware corporation, that "[g]asoline containing MTBE is handled in the same manner as hydrocarbon-only gasoline . . . [t]here are no extraordinary handling or safety precautions above those customary to gasoline." (Axline Dec., ¶ 5, Ex. 4.) OCWD mischaracterized that statement as relating to the handling of MTBE when it leaks or spills from underground storage tanks or otherwise, when the meaning of that statement was that MTBE-gasoline could be handled at refineries and shipped, stored, and transported from refineries in the same manner as hydrocarbon-only gasoline without modifications to the distribution system, unlike gasoline containing ethanol. Once again, OCWD's mischaracterization of evidence, and its taking evidence out of context, demanded Lyondell offer Exhibit 84 to correct the record.

b. Martin Decl. (II), Ex. 90

Tesoro cited to Martin, Ex. 90, an exhibit to James Keating's deposition transcript, in response to OCWD's new contention that "Petro-Diamond has never provided copies of its sales records," suggesting that there was no evidence as to whether Petro-Diamond supplied product to G&M Oil. 56.1 Opp. ¶ 159. To avoid confusion and correct the record, Tesoro submitted Exhibit 90, which provides a list of Petro-Diamond's customers and contains no reference to G&M Oil. OCWD's contention that Petro-Diamond provided no sales records is particularly egregious given that OCWD noticed Mr. Keating's deposition, and he provided Ex. 90 in response to OCWD's document demands.

c. Anderson Decl. (II), Ex. 92

CUSA cited to Anderson, Ex. 92, Jennifer Talbert's deposition transcript, in response to OCWD's new contention that CUSA operated the G&M Oil stations as a result of its investment in G&M Oil Co. LLC. 56.1 Opp. ¶¶ 6-8. While the District's argument fails legally because an investor in an LLC is not liable for the actions of the LLC, it also fails because Ms. Talbert testified that the workers at the G&M Oil stations were employees of G&M Oil Co. Inc., not CUSA and not G&M Oil Co. LLC. In other words, Exhibit 92 was needed to correct OCWD's misleading statement regarding the operations at the G&M Oil stations.

d. Roy Decl. (II), Ex. 96

Defendants' Motion cited discrete passages from the Rekhlaui deposition transcript and exhibits and, in accordance with the Court's directives, submitted only the pertinent pages.

**HUNTON &  
WILLIAMS**

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OCWD responded by submitting additional pages from the Rekhlaui deposition transcript and exhibits, but in doing so, OCWD created a misleading record regarding the content and meaning of Mr. Rekhlaui's testimony and the role of Steve Roth. To avoid any possible confusion and correct the record, Exxon submitted Exhibit 96, which consists of two additional pages from the Rekhlaui transcript and one additional page from the deposition exhibits. The purpose of the submittal is explained in Exxon's response regarding Paragraph 2 of the Rule 56.1 Statement. Thus, any attempt by OCWD to strike the exhibit would be improper.

For the reasons outlined above, Defendants do not agree to withdraw any of the declarations or exhibits submitted with their Reply. However, Defendants do agree to withdraw references to the Chen Reply Declaration in their 56.1 Reply at ¶¶ 119-121, 125 and 139.

Sincerely,

  
Diana Pfeffer Martin

cc: All Counsel (via File & ServeXPress)

*In Re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation:  
Orange County Water District v. Unocal Corp., et al., Case No. 04 Civ. 4968*

**PROOF OF SERVICE VIA LEXISNEXIS FILE AND SERVE**

I am a citizen of the United States and an employee in the County of Sacramento. I am over the age of eighteen (18) years and not a party to this action. My business address is Miller, Axline, & Sawyer, 1050 Fulton Avenue, Suite, 100, Sacramento, California 95825.

On the date executed below, I electronically served the document(s) via LexisNexis File & Serve, described below, on the recipients designated on the Transaction Receipt located on the LexisNexis File & Serve website:

**ERRATA TO PLAINTIFF ORANGE COUNTY WATER DISTRICT'S OBJECTIONS  
TO NEW EVIDENCE SUBMITTED WITH DEFENDANTS' REPLY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

I declare under penalty of perjury that true and correct copies of the above document(s) were served via LexisNexis File & Serve on August 28, 2014.

  
KATHY HERRON